No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
MARK B. STERN
ADAM C. JED
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY E. MCLEOD
Acting Legal Adviser
Department of State
Washington, D.C.

QUESTIONS PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 100, provides that "[w]here a child has been wrongfully removed" from one contracting state to another or wrongfully retained in a contracting state and, at the date of the commencement of judicial proceedings, "a period of less than one year has elapsed" from the date of the wrongful removal or retention, the child shall be "return[ed]" "forthwith." The Convention further provides that "even where the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

The questions presented are as follows:

1. Whether equitable tolling applies to the one-year period that triggers the availability of the "now settled" defense under Article 12.

2. Whether a child's lack of lawful immigration status in the United States precludes, as a matter of law, the conclusion that the child is "now settled" under Article 12.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Treaty, statutes and regulation:

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 12-820

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or Convention) "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010); see Hague Convention, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51

Fed. Reg. 10,498 (Mar. 26, 1986).[1] The Convention establishes uniform legal standards and identifies remedies to be employed when a child is abducted from one country to another. See Convention introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See Art. 1. The return remedy is intended to "leave[] custodial decisions to the courts of the country of habitual residence." *Abbott*, 130 S. Ct. at 1989.

Subject to certain defenses, if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located must "order the return of the child forthwith." Convention Art. 12. When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for seeking return of a child abducted to the United States. See *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1021-1022 (2013). Under ICARA, a person who seeks a child's return from the United States may file a petition in state or federal court, and the court must "decide the

---

[1] The Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State in connection with the Senate's consideration of the Convention, see *id.* at 10,494, 10,503-10,516.

case in accordance with the Convention." 42 U.S.C. 11603(a), (b) and (d).[2]

2. Petitioner and respondent are the parents of a child who was born in England in 2005. Pet. App. 4a-5a. In November 2008, respondent left petitioner, whom she alleged was abusive, *id.* at 5a-6a, and moved into a women's shelter in England with the child. *Id.* at 6a. In July 2009, respondent and the child left the United Kingdom and eventually traveled to the United States. Since then, they have been living in New York with respondent's sister and her family. *Ibid.*

After respondent's departure, petitioner unsuccessfully attempted to locate his child, contacting respondent's sisters and various police and government offices. Pet. App. 8a. In July 2009, petitioner initiated proceedings in England, seeking orders that would enable him to locate the child. *Id.* at 8a, 58a. In March 2010, petitioner filed an application with the Central Authority for England and Wales, seeking the child's return. *Id.* at 8a. The application, in which petitioner suggested that respondent and the child might be living in New York with respondent's sister, was sent to the United States Central Authority. *Id.* at 59a & n.10.

3. a. In November 2010, 16 months after respondent removed the child from the United Kingdom, petitioner commenced this action, seeking to have the child returned to the United Kingdom pursuant to the Convention and ICARA. Pet. App. 8a-9a. Respondent did not dispute that she had wrongfully removed the child from

---

[2] As required by Article 6 of the Convention, ICARA also provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). The Office of Children's Issues in the Bureau of Consular Affairs in the State Department is the Central Authority. See 22 C.F.R. 94.2.

the United Kingdom within the meaning of the Convention. *Id.* at 78a-80a. But she relied on two of the Convention's defenses to return, including Article 12's provision that when the return petition is filed more than a year after the child's abduction, the court may decline to order return if "it is demonstrated that the child is now settled in its new environment." Art. 12; Pet. App. 81a, 92a-94a. Petitioner contended that Article 12's one-year period was subject to equitable tolling, that the seven-month period during which petitioner asserted he did not "kn[o]w that the child was probably in New York" should be tolled, and that his petition should therefore be treated as though it had been filed within a year of the child's removal from the United Kingdom. *Id.* at 102a; see *id.* at 95a. As a result, petitioner argued, the "Article 12 defense [of settlement] is not available to Respondent." *Ibid.*

b. In February 2011, the district court held an evidentiary hearing, at which the parties presented evidence concerning, among other things, the child's settlement in the United States and petitioner's entitlement to equitable tolling of the one-year period under Article 12. Pet. App. 43a, 60a-73a, 95a, 102a-103a.

In April 2011, the district court denied petitioner's request for the child's return. Pet. App. 35a-36a, 37a-38a, 39a-115a. The court first held that "[t]he one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling." *Id.* at 99a. The court also observed that "even if equitable tolling could apply to Convention petitions," *id.* at 101a, tolling would not be warranted in this case, in part because respondent "did not conceal the child to an extent that would warrant equitable tolling," *id.* at 103a.

The district court next concluded, based on evidence of the child's family, social, and educational ties to New York, that the child had become settled in her new environment. Pet. App. 104a-111a. The court acknowledged that respondent and the child "are not legally in the United States." *Id.* at 108a. But the court concluded that because deportation was not imminent, "the immigration status of the child and Respondent is [unlikely] to upset the stability of the child's life here." *Id.* at 109a.

Finally, the district court held that although Article 12 does not bar a court from ordering the return of a settled child, Pet. App. 100a, it would not order return in this case in light of the child's strong connection to New York and the lack of any countervailing interest warranting return. *Id.* at 112a-114a.

4. The court of appeals affirmed. Pet. App. 1a-34a.

The court held that "the one-year period set out in Article 12 is not subject to equitable tolling." Pet. App. 17a. The court reasoned that "[u]nlike a statute of limitations," which would prohibit filing a petition after the specified period had run, expiration of the one-year period in Article 12 "merely permits courts to consider" whether the child is settled in her new environment in deciding whether to order return. *Id.* at 18a-19a. Because Article 12 is designed to permit the court to "take into account a child's interest in remaining in the country," the court concluded, "allowing equitable tolling of the one-year period would undermine its purpose." *Id.* at 24a.

The court of appeals also observed that equitable tolling was not necessary to ensure that abducting parents do not gain an advantage by concealing the child's whereabouts. Pet. App. 19a. The court explained that

Article 12 permits a court to order return even if the child has become settled in her new environment, and therefore the court may take equitable considerations into account in deciding whether to order return. *Id.* at 18a-19a.

The court of appeals next rejected petitioner's contention that "[w]here an abducted child resides in the abducted-to country illegally, a well-settled finding should be barred as a matter of law." Pet. App. 28a (brackets in original). The court explained that being "'settled' should be understood to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment." *Id.* at 29a. Thus, "immigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12," and "in any given case, the weight to be ascribed to a child's immigration status will necessarily vary." *Id.* at 28a.

DISCUSSION

This Court's review is warranted with respect to the question whether Article 12's one-year period is subject to equitable tolling. The court of appeals correctly held that equitable tolling is not available, but that a district court has equitable discretion to order a child returned even if she has become settled in her new environment. The court's decision on equitable tolling, however, conflicts with decisions of three other courts of appeals. That circuit conflict is likely to give rise to uncertainty about, and increased litigation concerning, the availability of equitable tolling under Article 12, which in turn could delay the adjudication of petitions for return. Such delays are inconsistent with the Convention's objective of fostering the uniform and prompt resolution of

return petitions. See *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1026-1028 (2013). The Court should therefore grant certiorari on the first question presented.

In contrast, certiorari is unwarranted with respect to the question whether a child's current lack of lawful immigration status precludes, as a matter of law, finding that a child is "settled" under Article 12. The court of appeals correctly held, in agreement with the only other court of appeals to consider the issue, that immigration status is a relevant consideration whose weight in the fact-specific settlement analysis may vary according to the circumstances.

I. THIS COURT'S REVIEW IS WARRANTED ON THE QUESTION WHETHER ARTICLE 12'S ONE-YEAR PERIOD IS SUBJECT TO EQUITABLE TOLLING

A. The Court Of Appeals Correctly Held That The One-Year Period Is Not Subject To Equitable Tolling, But That The Court Retains Equitable Discretion To Order Return Even If The Child Is Now Settled

Article 12's one-year period is not subject to equitable tolling because it is not a statute of limitations that governs the time in which a claim must be filed or be barred entirely. Instead, the expiration of the one-year period permits a court, in deciding on the merits whether return is appropriate, to consider whether the child has become settled in her new environment. The court retains equitable discretion under Article 12 to order that a child who is now settled in the United States should nonetheless be returned, and concealment or other misconduct is a factor that the court may consider. A court may also decline to undertake the settlement analysis before ordering return if the circumstances of the case warrant, such as if the court concludes that

equitable factors supporting return would outweigh the fact that the child may be settled in her new environment.

1. a. Article 12 of the Hague Convention establishes a two-pronged framework governing when a court must order that a wrongfully removed or retained child be returned to her country of habitual residence. When the left-behind parent commences proceedings seeking the child's return "less than one year" after the child was wrongfully removed or retained, a court must (with exceptions not relevant here) "order the return of the child forthwith." Art. 12. In contrast, when "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

Article 12's one-year period does not function as a statute of limitations, and it is therefore not subject to equitable tolling. See *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice period was not subject to equitable tolling because it was a condition precedent, not a limitations period, and tolling would be inconsistent with the purpose of the notice period). A statute of limitations establishes a period in which a claim must be brought if it is to be adjudicated at all, and it reflects a judgment about the point at which concerns about repose, stale claims, lost evidence, and the parties' need for certainty outweigh the plaintiff's interest in bringing a claim. See *Young* v. *United States*, 535 U.S. 43, 47 (2002). The doctrine of equitable tolling applies when circumstances render the balancing of interests embodied in the limitations period inequitable—*i.e.*, when extraordinary circumstances prevent the plaintiff, despite due diligence, from bringing his claim during the

limitations period. See *Lawrence* v. *Florida*, 549 U.S. 327, 330-332, 336 (2007). When applied, tolling permits the court to treat the claim as though it were timely filed. *Ibid.*

Rather than fixing a time limit after which claims under the Convention may not be filed, Article 12's one-year period governs the substantive scope of a court's inquiry in adjudicating the petition. The consequence of failing to file suit within a year is that the court is no longer automatically required to "order the return of the child forthwith" if it finds that the child was wrongfully removed (and no other exception to return applies), but instead may consider the child's ties to her new environment in deciding whether to order return. Art. 12. The expiration of the one-year period does not cut off the left-behind parent's ability to seek return, and it does not eliminate the court's authority to order return—to the contrary, the court must order return if the child is not settled (and no other exception to return applies), and it may order return even if the child is settled. See *ibid.*; pp. 11-12, *infra*. Rather than balancing only the parties' respective interests in redress and repose, then, Article 12's one-year period also takes into account *the child's* interests: one year represents the point at which the States Parties to the Convention determined that the child has been in the new environment long enough that the court, in deciding whether to order return, should be authorized to consider whether she is now settled in that environment. See Elisa Pérez-Vera, *Explanatory Report*, in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6-25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction*, para. 107, at 458 (Permanent Bureau trans., 1982) (*Actes et Documents*) (while the Convention presumes

that prompt return is in a child's best interests, settlement may affect the appropriateness of return).[3]

To apply equitable tolling as advocated by petitioner would disrupt this framework. In cases in which the court concluded that equitable tolling was appropriate, the petition would be treated as having been filed within one year. See p. 9, *supra*. The court would thus be *required* to order return "forthwith," Convention Art. 12, and would be foreclosed from considering whether the child had become settled in her new environment—no matter how long the child had lived there. But affording the court discretion to consider the child's settlement in cases in which she has been in the new country for a year—regardless of the reasons for that prolonged residence—is the very purpose of the Convention's provision of a one-year cutoff for the obligation to return the child "forthwith." *Explanatory Report* para. 107, at 458.

b. Article 12's text indicates in another way that equitable tolling is not available. Article 12 provides that the one-year period runs from the date of the wrongful removal or retention rather than the date the child's whereabouts were or reasonably should have been ascertained, and it makes no provision for an extension of the one-year period. Given that the Convention addresses conduct that might often involve some degree of concealment of the child's whereabouts, one would expect Article 12's text to address tolling had the Convention's drafters intended for it to be available. See *Explanatory Report* paras. 107-108, at 458-459 (acknowl-

---

[3] The *Explanatory Report* is recognized "as the official history and commentary on the Convention." 51 Fed. Reg. at 10,503. This Court has not decided how much weight the *Report* should be accorded. *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1995 (2010).

edging "difficulties encountered in establishing the child's whereabouts" but stating that the "single time-limit of one year" was the optimal resolution of competing concerns).

c. Although Article 12 is not subject to equitable tolling, "the Convention expressly provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct— * * * discretion to order the return of a child, even when a defense is satisfied." Pet. App. 27a. Article 12 provides that if the court concludes that the child is settled in her new environment, the court is not obligated to order return. But even then, Article 12 does not prohibit the return of a settled child. Convention Art. 12 (the court "shall also order return, unless" settlement is established). The court therefore retains equitable discretion to order return even if the child is settled. See *Blondin* v. *Dubois*, 238 F.3d 153, 164 (2d Cir. 2001); cf. *Asvesta* v. *Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (courts have discretion to order return notwithstanding establishment of any of the Convention's exceptions to return); *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (same).

In conducting that equitable assessment, the court could ultimately conclude that the abducting parent's conduct in concealing the child's whereabouts (and any other equitable factors) justify returning the child to the country of her habitual residence. Deterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent are important animating principles of the Convention. See *Explanatory Report* paras. 15-16, at 429. The court may therefore consider the abducting parent's misconduct, together with any other relevant circumstances, such as whether return would not be harmful or disruptive even though

the child has become settled, in deciding whether to order her return.

In addition, given that Article 12 contemplates that the child's settlement could be outweighed by other equitable factors, it follows that Article 12 also affords the court discretion to dispense with the "settled" inquiry—which can involve a fact-intensive inquiry into the child's living situation—when the court concludes that the circumstances justify ordering return regardless of the outcome of the settlement inquiry. For instance, the conduct of the concealing parent might be so extreme that return is called for irrespective of other circumstances. That authority is underscored by Article 18, which provides that "[t]he provisions of this Chapter [enumerating exceptions] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*." Convention Art. 18 (emphasis added).

2. The Convention's drafting history reinforces the conclusion that the one-year period is not subject to equitable tolling based on difficulties in locating the child. The preliminary draft of the Convention provided that when a parent sought return within six months of the abduction, the court was required to "order the return of the child forthwith." *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, in 3 *Actes et Documents* 166, 168 (Art. 11). If the child's location "was unknown," the six months would "run from the date of discovery," but the "total period" could not exceed one year. *Ibid.* After certain delegates expressed concern that determining the "date of 'discovery'" would be difficult, the drafters adopted a single time period that did not vary based on discovery. *Procès-verbal No 7,* in 3 *Actes et Documents*

290, 291-293. The United States urged that the period should be long enough to account for the difficulty of locating the child. *Id.* at 292. The delegates ultimately settled on one year as the appropriate point at which the child's "assimilation [becomes] an open question." *Procès-verbal No 10*, in *3 Actes et Documents* 312, 315. The debate over the length of the single time period thus indicates that the delegates factored in the potential difficulty of locating a child and understood that the one-year period would not be subject to tolling or extension. See *Procès-verbal No 7*, in 3 *Actes et Documents* 292-293; *Explanatory Report* para. 108, at 458 (describing drafters' rejection of "extension of the time-limit").

3. The court of appeals' decision is also consistent with the post-ratification understanding of other States Parties to the Convention. See *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1993 (2010). To our knowledge, the courts of other States Parties that have considered invocation of equitable tolling have uniformly declined to adopt it. See *Cannon* v. *Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32, 47-49 (Eng.) (rejecting equitable tolling as "too crude an approach"); *Kubera* v. *Kubera*, 2010 BCCA 118, para. 64 (B.C.); *A.C.* v. *P.C.*, HCMP001238/2004, 2005 WL 836263 (Ct. of First Instance) (Legal Reference System) (H.K.).

Courts of other States Parties also have generally held that courts possess equitable discretion under the Convention to order the return of a settled child, or that they should consider equitable factors, including concealment and the objectives of the Convention, in performing the settlement analysis. See *In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288, 1296-1297, 1304 (appeal taken from Eng.); *Cannon*, 1 W.L.R. at 49; *Kubera*, 2010 BCCA 118, paras. 102-104; *A.* v. *M.*, 2002 NSCA 127,

paras. 74-82 (N.S.); *P.* v. *B. (No. 2)*, [1999] 4 I.R. 185 (Ir.); cf. *Director-General, Dep't of Cmty. Servs.* v. *M & C*, (1998) 24 Fam. L.R. 178, paras. 95-98 (reserving question of discretion to order return under Convention or its implementing regulations) (Family Ct.) (Austr.).

4. Consistent with the foregoing discussion, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States, interprets Article 12 not to permit equitable tolling, but to confer on the court equitable discretion, in cases filed more than a year after wrongful removal, to consider concealment and other equitable factors in determining whether the child should be returned and whether to undertake the settlement inquiry. In its 1986 analysis of the Convention in connection with ratification proceedings, the State Department stated generally that a court is not obligated to return a child who has become settled in her new environment, that "[t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition," and that "it is highly questionable whether the [abducting parent] should be permitted to benefit from such conduct absent strong countervailing considerations."[4] 51 Fed. Reg. at

---

[4] The United States' written response to the 2006 Questionnaire from the Hague Conference on Private International Law stated that "[t]he [United States Central Authority] supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child." Hague Conference on Private Int'l Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 577 (2006). The State Department thus endorsed the concept of "equitable tolling," as it had been applied in several lower-court decisions, as a means of enabling courts

10,509. The State Department's interpretation is "entitled to great weight." *Abbott*, 130 S. Ct. at 1993 (citation omitted).

B. This Court's Review Is Warranted To Resolve The Disagreement Among The Courts Of Appeals About Whether Article 12's One-Year Period Is Subject To Equitable Tolling

1. The decision below conflicts with published decisions of the Ninth and Eleventh Circuits, see *Duarte* v. *Bardales*, 526 F.3d 563, 569-571 (9th Cir. 2008); *Furnes* v. *Reeves*, 362 F.3d 702, 723-724 (11th Cir.), cert. denied, 543 U.S. 978 (2004), as well as an unpublished decision of the Fifth Circuit, see *Dietz* v. *Dietz*, 349 Fed. Appx. 930, 933 (2009) (following the Eleventh Circuit). Those courts treat the one-year time period as a statute of limitations, and they have held that equitable tolling applies to Article 12 because tolling "should be read into every federal statute of limitations." *Furnes*, 362 F.3d at 723 (citation omitted); see *Duarte*, 526 F.3d at 570.[5]

In those circuits, once a court has determined that the left-behind parent has demonstrated that equitable tolling is appropriate, the court must order the child's

---

to take into account concealment and other equitable factors in determining the ultimate disposition of return petitions. Upon broader examination of the issues in connection with its participation in this case as an amicus curiae, the Department concluded that "equitable tolling" in the traditional sense is not the appropriate framework for considering concealment and other equities. Rather, "equitable discretion" is the more appropriate framework for consideration by courts of concealment and other factors bearing on return.

[5] Although the Ninth Circuit subsequently expressed concern that "equitable tolling may permit the return of children otherwise settled in their new environment," the court did not abrogate *Duarte*. See *In re B. del C.S.B.*, 559 F.3d 999, 1014 (2009). Instead, it suggested that tolling should be applied sparingly. *Ibid.*

return without considering whether she had become settled in her new environment. See *Furnes*, 362 F.3d at 723-724 (ordering child returned without inquiring into settlement). By contrast, a court in the Second Circuit may undertake the now-settled analysis even in circumstances in which equitable tolling would be appropriate in the Fifth, Ninth and Eleventh Circuits. While courts in the Second Circuit have equitable authority to order return of a child even if she is found to be settled in her new environment, and may thus sometimes reach the same result as a court applying equitable tolling, the ability to consider whether the child is settled will likely be outcome-determinative in some cases.

Contrary to respondent's suggestion (Br. in Opp. 21-22), further percolation is not warranted. As respondent observes, the circuit split is relatively shallow, and the circuits that have adopted equitable tolling have not engaged in extensive analysis or taken into account all of the factors the Second Circuit found persuasive, including the position of the United States. It is therefore possible that the courts that have adopted equitable tolling might reconsider their views in light of the Second Circuit's decision. Despite these considerations, this Court's review is warranted now.

The disagreement among the circuits gives rise to uncertainty about the parties' respective rights when a petition is filed more than one year after the child's abduction. That uncertainty is likely to engender increased litigation about the availability or application of equitable tolling, which would delay the final resolution of some petitions for return—a particularly harmful result for children and parents who have already lived with the uncertainty caused by abduction for over a

year. Such delay is inconsistent with this Court's statement that "courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation." *Chafin*, 133 S. Ct. at 1027; *id.* at 1028 (litigation "uncertainty adds to the challenges confronting both parents and child"). Uniformity in application of the Convention internationally is also important to achieving its goals of deterring international parental abduction and achieving the prompt return of abducted children. See Art. 1; *Explanatory Report* para. 16, at 429; see also 42 U.S.C. 11601(b)(3)(B); *Abbott*, 130 S. Ct. at 1991. This Court's review therefore is warranted to resolve the conflict among the courts of appeals.

2. The question whether Article 12's one-year period may be equitably tolled also is important. Because international child abduction sometimes involves concealment, and because the left-behind parent may often have difficulty locating the child in another country even without concealment, the availability of equitable tolling is a recurring issue in Hague Convention litigation. Although only four courts of appeals have addressed the issue, the question is litigated with some frequency in district courts—and resolved in decisions that are often not appealed, see Br. in Opp. 18 n.6 (citing cases)—as well as in state courts. See, *e.g.*, *Aranda* v. *Serna*, No. 3:12-cv-0311, 2013 WL 665064, at *11-*12 (M.D. Tenn. Feb. 22, 2013); *Yaman* v. *Yaman*, No. 1:12-cv-221, 2013 WL 322204, at *3-*8 (D.N.H. Jan. 28, 2013); *Fernandez-Trejo* v. *Alvarez-Hernandez*, No. 8:12-cv-02634, 2012 WL 6106418, at *3 (M.D. Fla. Dec. 10, 2012); *Font Paulus ex rel. P.F.V.* v. *Vittini Cordero*, No. 3:12-cv-986, 2012 WL 2524772, at *7-*8 (M.D. Pa. June 29, 2012); *Edoho* v. *Edoho*, No. H-10-1881, 2010 WL 3257480, at *7

(S.D. Tex. Aug. 17, 2010); *F.H.U.* v. *A.C.U.*, 48 A.3d 1130, 1145-1146 (N.J. Super. Ct. 2012); *Perez* v. *Garcia*, 198 P.3d 539, 544-545 (Wash. Ct. App. 2009).

3. This case is a suitable vehicle for resolving the question presented. Respondent contends (Br. in Opp. 25-26) that a decision in petitioner's favor would not alter the outcome of the case because the district court held in the alternative that tolling would be unwarranted on the facts of this case. But the court of appeals, having concluded that Article 12 was not subject to equitable tolling, did not address petitioner's argument that the district court erred in concluding that the facts did not support tolling. See Pet. C.A. Br. 16-28 (arguing that the circumstances warranted tolling); Pet. C.A. Reply Br. 12-16. If this Court were to hold that tolling is available, petitioner would presumably be entitled to renew on remand his arguments that the district court erred in concluding that tolling is unwarranted.

More broadly, if this Court were to hold that the one-year period in Article 12 is subject to equitable tolling, its decision might articulate standards for tolling in Convention cases or otherwise provide guidance as to how courts should conduct the tolling analysis. Cf. *Chafin*, 133 S. Ct. at 1027 (providing guidance to courts considering motions to stay return orders). Conversely, if the Court holds that equitable tolling as such should not be applied to the one-year period, it could offer guidance concerning how delay in commencing a proceeding might nonetheless be taken into account in deciding whether to order return of a child who is found to be settled in her new environment. Either way, this Court's decision could provide direction for further proceedings in this and other cases.

II. THE QUESTION WHETHER A CHILD MAY BE FOUND TO BE SETTLED DESPITE LACKING LAWFUL IMMIGRATION STATUS DOES NOT WARRANT THIS COURT'S REVIEW

The court of appeals correctly held that a child's present lack of lawful immigration status does not, as a matter of law, prevent the child from being settled in the United States under Article 12. That decision does not conflict with any decision of this Court or any other court of appeals, and it does not warrant this Court's review.

A. The court of appeals correctly held that a child's lack of lawful immigration status does not "as a matter of law" preclude a finding that the child is now settled in her new environment. Pet. App. 28a (citation omitted). Rather, immigration status is "one of many factors" that courts may take into account in performing the settlement analysis, and its weight will necessarily vary with the circumstances at issue. *Ibid.*

In determining whether a child is "settled" in her new environment—a concept not defined in the Convention or ICARA—courts consider the facts of each case in order to ascertain whether the child has developed "significant connections to the new country." 51 Fed. Reg. at 10,509. Relevant factors may include the child's age, the stability of her living situation, the duration of her residence in the new environment, the likelihood of further relocation, school and social ties, and the parent's financial stability. See, *e.g.*, *In re B. del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009).

Within that inquiry, the degree to which a child's immigration status may affect whether she is settled will necessarily vary based on the nature and circumstances of the child's lack of status and its impact on her ability

to form connections to her new environment. Pet. App. 32a. For example, a child's present lack of lawful status may have only minimal effects on her ties to the new country if she is likely to obtain lawful status in the near future or would not likely be the subject of an immigration enforcement action. Cf. *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012) (describing avenues of discretionary relief from removal and immigration officials' broad discretion whether to pursue removal). Conversely, a child's present permission to remain in the country might not suggest that she is settled if she faces a risk of being removed after her temporary status expires. The court of appeals therefore correctly held that the weight accorded to lack of immigration status should not be determined "in the abstract," but instead should be based on the circumstances of the case. Pet. App. 32a.

Contrary to petitioner's argument, the court of appeals did not hold that immigration status is relevant to the settlement analysis only when the child faces an "imminent" threat of removal. Pet. 23 (citation omitted). Rather, the court "decline[d] to impose a categorical rule" that the weight to be given a child's immigration status varies only with the imminence of deportation. Pet. App. 32a n.16. Nor did the court suggest, as petitioner contends (Pet. 24-25), that possible long-term consequences of lacking legal status, such as difficulty obtaining government benefits, are irrelevant to the settlement inquiry. Pet. App. 32a n.16. The court declined to find "error in the district court's failure to consider" the long-term consequences of lacking lawful status, but that holding was based on petitioner's failure to present the argument to the district court, not on any categorical rule against considering such evidence. *Id.* at 33a n.17.

Petitioner also contends that respondent should have been required to submit "evidence of a viable basis to change the child's status" before the child could be considered settled in the United States. Pet. 23. But this case would not be an appropriate vehicle for considering that question, because petitioner did not raise it in the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); Pet. C.A. Br. 36-54; Pet. Reply Br. 2-7.

B. There is no conflict among the courts of appeals concerning the effect of a child's immigration status on whether a child is settled. Aside from the Second Circuit, only the Ninth Circuit has addressed that issue, and it too held that lack of lawful immigration status does not necessarily preclude a child from being settled in her new environment.[6] See *B. del C.S.B.*, 559 F.3d at 1012 ("[I]t makes little sense to permit immigration status to serve as a determinative factor.").

Foreign courts have similarly given varying weight to immigration status. See, *e.g.*, *A.* v. *M.*, 2002 NSCA 127, paras. 86-88; *In re C (A Child)* [2006] EWHC 1229, paras. 56-57. We are not aware of any foreign decision holding that immigration status is in all cases determinative of the settlement inquiry.

---

[6] The Ninth Circuit also suggested that lacking lawful status is "[i]n general * * * relevant only if there is an immediate, concrete threat of deportation." *B. del C.S.B.*, 559 F.3d at 1009. The import of that statement is somewhat unclear, however, as the court also stated that immigration status should only be a "significant" consideration when the threat of removal is imminent, *id.* at 1010, and that "[i]mmigration status cannot be *determinative* * * * if * * * there is no imminent threat of removal," *id.* at 1014 (emphasis added). Thus, the Ninth Circuit does not appear to have announced a categorical rule about the weight to be given to immigration status.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
MARK B. STERN
ADAM C. JED
Attorneys

MARY E. MCLEOD
Acting Legal Adviser
Department of State

MAY 2013